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Pasupathi a/l Sithamparam v Adam bin Abdullah

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-2004–11 OF 2016
VERNON ONG, HASNAH HASHIM AND ASMABI MOHAMAD JJCA
16 APRIL 2018

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Land Law — Caveats — Caveatable interest — Respondent lodged private caveat over land to 'secure' a loan he had given — Respondent failed to disclose in his caveat application that borrower had given him an option to buy the land if loan was not repaid — Borrower later sold his land to appellant but transfer could not be done because of the caveat — High Court dismissed appellant's application to remove the caveat on ground the option to purchase gave the respondent a caveatable interest in the land — Whether High Court wrong in not confining its examination to the grounds contained in the application for entry of the caveat — Whether grounds only showed respondent had a monetary claim against the borrower and no interest in the land — Whether on that ground alone caveat had to be removed — Whether option to purchase never exercised by the respondent and lapsed — Whether appellant had locus standi to apply for removal of caveat

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The respondent gave a friendly loan of RM275,000 to the owner of a piece of land ('the land'). The loan agreement between the parties stated that if the loan was not repaid within one month of the date of the agreement, the respondent had the right to exercise an option to buy the land for RM275,000. A few months later, the landowner entered into an agreement to sell the land to the appellant for RM500,000. Although the purchase price was paid in full, the land could not be transferred to the appellant because of the existence of a private caveat lodged by the respondent. In his application for entry of the caveat, the respondent mentioned only the fact that he had given the loan to the landowner and said nothing about the option to purchase. The appellant's application to the High Court to have the caveat removed failed as the judge held, inter alia, that the option to purchase gave the respondent a caveatable interest in the land. In the instant appeal against the decision, the appellant argued that: (a) the respondent's claim against the landowner was only monetary and that he had not shown any caveatable interest either in the form of a claim to any title or registrable interest in the land or any beneficial interest under any trust affecting the land or interest therein; and (b) since the respondent failed to exercise the option to buy the land within the one-month period following the landowner's default in repaying the loan, the option lapsed and consequently there was no sale and purchase agreement between the parties in respect of the land. Apart from maintaining that the option to purchase gave him a caveatable interest, the respondent alleged that the

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appellant had no locus to apply for removal of the caveat. The respondent conceded that he had not adduced any evidence to show that he had exercised the option to purchase.

Held, allowing the appeal, setting aside the decision of the High Court and allowing the appellant's application for removal of the caveat:

(1) The High Court had founded its decision on the basis that the respondent had an option to buy the land. However, in the grounds of his application (including his statutory declaration) for entry of the caveat, there was no mention or reference to the option to purchase. As such, the High Court failed to confine its examination to the grounds contained in the application for entry of the caveat (see paras 17–18).

(2) It was trite that if the grounds contained in the application for entry of caveat were insufficient in law to support a caveat, then the caveat had to be removed without the court having to go any further. Even if the fact that the respondent was granted an option to purchase was taken into account, there was no evidence to indicate that the option was exercised to buy the land immediately after the expiry of the due repayment date of the loan or within a reasonable time thereafter. The option had lapsed as the respondent failed to exercise the option within the one-month period immediately after the borrower failed to repay the loan. As such, it could not be said that there was a transaction that could ultimately lead to registration of the land on the register. On the particular facts of this case, the mere existence of the option was of itself insufficient in law to support a caveat. It was therefore unnecessary for the court to consider further the question of whether or not the respondent's claim disclosed a serious question for trial or the question of balance of convenience (see paras 19–20).

(3) The appellant's locus was not challenged or disputed by the respondent in his affidavit. At any rate, on the undisputed facts of this case, the court was satisfied that the appellant was a person aggrieved by the existence of the caveat and accordingly had the necessary locus to apply for its removal under s 327 of the National Land Code (see para 11).

[Bahasa Malaysia summary

Responden memberikan pinjaman persahabatan sebanyak RM275,000 kepada pemilik tanah ('tanah'). Perjanjian pinjaman antara pihak-pihak tersebut menyatakan jika pinjaman tidak dibayar dalam satu bulan dari tarikh perjanjian tersebut, responden berhak untuk melakukan pembelian tanah dengan harga RM275,000. Beberapa bulan kemudian, pemilik tanah menandatangani perjanjian untuk menjual tanah itu kepada perayu sebanyak RM500,000. Walaupun harga pembelian telah dibayar sepenuhnya, tanah itu tidak boleh dipindahkan kepada perayu kerana adanya kaveat persendirian

yang dimasukkan oleh responden. Dalam permohonannya untuk memasuki kaveat, responden hanya menyebut fakta bahawa dia telah memberikan pinjaman kepada pemilik tanah dan tidak mengatakan apa-apa mengenai pilihan untuk membeli. Permohonan perayu ke Mahkamah Tinggi untuk membatalkan kaveat persendirian gagal kerana hakim memutuskan, antara lain, bahawa pilihan untuk membeli memberikan responden kepentingan kaveat di tanah tersebut. Dalam rayuan ini terhadap keputusan itu, perayu berhujah bahawa: (a) tuntutan responden terhadap pemilik tanah adalah hanya kewangan dan bahawa dia tidak menunjukkan apa-apa kepentingan kaveat sama ada dalam bentuk tuntutan kepada mana-mana hakmilik atau kepentingan boleh didaftarkan di tanah atau apa-apa kepentingan yang bermanfaat di bawah mana-mana amanah yang berkaitan tanah atau kepentingan dalam hal itu; dan (b) oleh kerana responden gagal melaksanakan pilihan untuk membeli tanah itu dalam tempoh satu bulan berikutan kegagalan pemilik tanah dalam membayar balik pinjaman itu, pilihan itu luput dan akibatnya tidak ada perjanjian jual beli antara pihak-pihak yang berkenaan dengan tanah itu. Selain daripada mengekalkan bahawa pilihan untuk membeli memberinya kepentingan keveat, responden mendakwa bahawa perayu tidak mempunyai lokus untuk memohon pembatalan kaveat tersebut. Responden mengakui bahawa dia tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa dia telah melaksanakan pilihan untuk membeli.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan permohonan perayu untuk membatalkan kaveat:

(1) Mahkamah Tinggi telah mengasaskan keputusannya atas dasar bahawa responden mempunyai pilihan untuk membeli tanah itu. Walau bagaimanapun, berdasarkan alasan permohonannya (termasuk pengisytiharan berkanun) untuk kemasukan kaveat, tidak ada menyebut atau merujuk kepada pilihan untuk membeli. Oleh itu, Mahkamah Tinggi gagal menghadkan pemeriksaannya dengan alasan yang terdapat dalam permohonan kemasukan kaveat (lihat perenggan 17–18).

(2) Adalah tetap bahawa jika alasan yang terkandung dalam permohonan kemasukan kaveat tidak mencukupi dalam undang-undang untuk menyokong suatu kaveat, maka kaveat itu harus dikeluarkan tanpa mahkamah perlu pergi lebih lanjut. Walaupun hakikat bahawa responden diberi pilihan untuk membeli telah diambil kira, tidak ada keterangan untuk menunjukkan bahawa pilihan itu dilaksanakan untuk membeli tanah sebaik sahaja tamat tarikh pembayaran balik pinjaman atau dalam masa yang munasabah selepas itu. Pilihan itu telah luput ketika responden gagal melaksanakan pilihan dalam jangka masa satu bulan segera setelah peminjam gagal membayar pinjaman. Oleh itu, tidak boleh dikatakan terdapat transaksi yang pada akhirnya boleh membawa kepada pendaftaran tanah pada daftar. Pada fakta-fakta tertentu dalam kes ini, kewujudan pilihan itu sendiri tidak mencukupi

dalam undang-undang untuk menyokong kaveat. Oleh itu, adalah tidak perlu bagi mahkamah untuk mempertimbangkan lebih lanjut persoalan mengenai sama ada tuntutan responden mendedahkan soalan yang serius untuk perbicaraan atau persoalan keseimbangan kemudahan (lihat perenggan 19–20).

(3) Lokus perayu tidak dicabar atau dipertikaikan oleh responden dalam afidavitnya. Apa-apa pun, atas fakta yang tidak dipertikaikan mengenai kes ini, mahkamah berpuas hati bahawa perayu adalah orang yang terkilan dengan kewujudan kaveat dan sewajarnya mempunyai lokus yang diperlukan untuk memohon pembatalannya di bawah s 327 Kanun Tanah Negara (lihat perenggan 11).]

Notes

For cases on caveatable interest, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2757–2760.

Cases referred to

Chong Siat Yong & Ors v Yee Mun Ying & Anor [1985] MLJU 3; [1986] 1 CLJ 37, HC (refd)

Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd [1999] 2 MLJ 537, CA (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44; [1976] 1 LNS 135, PC (refd)

Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475; [2012] 7 CLJ 843, CA (refd)

Tan Leng Choo & Ors v Law Teck Huat [2009] 1 MLJ 820, CA (refd)

Trans-Summit Sdn Bhd v Chun Nyook Lin [1995] 3 MLJ 247, CA (refd)

Legislation referred to

National Land Code ss 323(1), (1)(a), (1)(b), 327, Form 19B

Appeal from: Civil Suit No 24NCVC-772–05 of 2016 (High Court, Kuala Lumpur)

M Kaliaperumal (Priyadharsini Nair with him) (Kali & Assoc) for the appellant.
P Sundramoorthy (Ram) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] The appeal herein is against the decision of the High Court dismissing the plaintiff's application to remove the defendant's private caveat lodged over a piece of land. In this judgment the parties shall be referred to as they were in the court below.

SALIENT BACKGROUND FACTS

[2] Pursuant to a friendly loan agreement dated 19 June 2015 ('the loan agreement'), the defendant agreed to lend to one Malarkodi a/p Maratha Muthu ('the borrower') the sum of RM257,000. Insofar as this appeal is concerned, the salient terms of the loan agreement are as follows:

(a) the loan is repayable within one month of the date of the loan agreement ('the payment due date');

(b) the borrower granted to the defendant an option to purchase the borrower's land held under HSD 40161, Lot 26988, Mukim Petaling, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur ('the land') at the prevailing market price; and

(c) in the event the loan sum is not repaid by the payment due date, the defendant shall have the right to exercise the option to purchase the land at the purchase price of RM275,000.

[3] Meanwhile on 22 October 2015, the borrower entered into a sale and purchase agreement with the plaintiff to sell the land to the plaintiff for the purchase price of RM500,000. The purchase price has been paid in full. However, the land could not be transferred to the plaintiff as a land search conducted on 28 March 2016 showed that a private caveat had been lodged by the defendant over the land. As such, the duly executed and stamped memorandum of transfer could not be presented for registration.

[4] The defendant had lodged a private caveat over the land on 17 March 2016. According to the application for entry of private caveat (Form 19B) lodged by the defendant, his claim to the land is grounded in the following terms:

> Pada 19/6/2015 saya telah membuat satu Perjanjian ('Friendly Loan Agreement') dengan MALAKODI a/p MARATHA MUTHU (NO. K/P: 631116-01-6460). Beliau telah meminjam wang sebanyak (RM275,000.00) daripada saya pada 19/6/2015. Alasan-alasan selanjut adalah di surat akuan yang dilampirkan bersama. Oleh itu saya ingin memasukkan kaveat ini ke atas tanah sepetimana dalam jadual

untuk memelihara kepentingan saya terhadap hartanah ini yang dikenali sebagai Geran 58829, Lot 26988, Mukim Petaling.

[5] For completeness, the defendant's statutory declaration verifying the claim is reproduced below:

Surat Akuan

Saya, ADAM BIN ABDULLAH (NO. K/P: 520115-10-5283) adalah seorang warganegara Malaysia yang beralamat di No. 316, Jalan 24/39, Taman Petaling, Kepong Bahru, 51200 Kuala Lumpur dengan sesungguhnya dan sebenarnya mengahui Pada 19/6/2015 saya telah membuat satu Perjanjian ('Friendly Loan Agreement') dengan MALAKODI a/p MARATHA MUTHU (NO. K/P: 631116-01-6460). Beliau telah meminjam wang sebanyak (RM275,000.00) daripada saya pada 19/6/2015. Saya memasukkan kaveat ini untuk mempertahankan kepentingan saya terhadap hartanah yang dikenali sebagai Geran 58829, Lot 26988, Mukim Petaling.

Saya, membuat akuan ini dengan kepercayaan bahawa apa-apa yang tersebut didalamjnya adalah benar serta menurut Akta berkanun 1960.

Diperbuat dan dengan sebenar-	)	
benarnya aiakui oleh	)	
ADAM BIN ABDULLAH	)	signed illegible
di KUALA LUMPUR	)	.....
di WILAYAH PERSEKUTUAN	)	ADAM BIN ABDULLAH
pada 17 Mar 2016.		
		Dihadapan saya,
		.....
		Pesuruhjaya sumpah

FINDINGS OF THE HIGH COURT

[6] The learned judicial commissioner ('JC') dismissed the application on the following grounds:

(a) the borrower had given the option to purchase the land under the loan agreement and that without the option the defendant would not have given the loan to the borrower. As such the defendant had a caveatable interest over the land;

(b) there was a serious question meriting a trial relating to the bona fides of the sale and purchase transaction between the plaintiff and the borrower; and

(c) the balance of convenience lies in favour of maintaining the status quo.

SUBMISSION OF PARTIES

[7] Learned counsel for the plaintiff took two main points. First, the defendant does not have any right to enter a caveat on the land as the defendant is not claiming title to the land or any registrable interest or any right to such title or interest to the land nor is the defendant claiming any beneficial interest under any trust affecting the land. The defendant only has a monetary claim against the borrower. A monetary claim does not amount to caveatable interest (*Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; *Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537; *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 (CA); s 323(1)(a) and (1)(b) of the National Land Code).

[8] Second, the defendant did not exercise the option to purchase the land within the one month period immediately after the borrower defaulted in the payment of the loan. As such the option had lapsed after the expiry of the one month period and has no effect pursuant to cl 5 of the loan agreement. Consequently, it was argued that there was no concluded contract between the defendant and the borrower for the sale and purchase of the land (*Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820 (CA)). At any rate, an option to purchase does not amount to a caveatable interest in the land (*Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475; [2012] 7 CLJ 843 (FC)).

[9] In reply learned counsel for the defendant argued firstly that the plaintiff had no locus to make the application because he had paid a portion of the purchase price to a third party instead of to the borrower qua vendor. As such, the sale and purchase agreement is a sham.

[10] Secondly, the defendant's caveatable interest is based on the option to purchase the land in the event the loan is not repaid. The borrower has not repaid the loan sum to the defendant. As such the defendant lodged a caveat against the land to protect his interest. Learned counsel conceded that there is no evidence on the record to show that the defendant had exercised the option to purchase. In answer to a question posed by the bench, learned counsel conceded that there was nothing in the appeal record to show or suggest that the defendant had exercised the option to purchase the land.

DECISION OF THIS COURT

[11] We will deal with the locus issue as a preliminary issue. We agree with learned counsel for the plaintiff that the plaintiff's locus was not challenged or disputed by the defendant as it was not pleaded by the defendant in his

affidavit. At any rate, on the undisputed facts we are satisfied that the plaintiff is a person aggrieved by the existence of the private caveat over the land and accordingly has the necessary locus to apply for its removal pursuant to s 327 of the National Land Code ('the NLC').

[12] The principal issue for determination in this appeal is the question of whether the defendant has any caveatable interest on the land. The law on this subject is well settled (see *Luggage Distributors*).

[13] The procedure to be adopted by court on the hearing for removal of a caveat may be distilled into the following three steps:

(a) conduct an examination of the grounds set out in the application for the caveat: this is a question of mixed fact and law. If the grounds expressed in the application are insufficient in law to support a caveat, then *cadit quaestio* (the dispute is over), and the caveat must be removed without having to go any further;

(b) if the claim as set out in the application in Form 19B amounts in law to a caveatable interest, the defendant must also show on the affidavit evidence that his claim discloses a serious question meriting a trial. This is question of fact; and

(c) if the court is satisfied that there is a serious question meriting a trial, the court will go on to consider whether the balance of convenience or balance of justice lies.

[14] What amounts in law to a caveatable interest is clearly spelt out under the NLC which provides that a private caveat may be entered in the following instances: (a) any person claiming title to, or any registrable interest in, any alienated land; (b) any person claiming a beneficial interest under any trust affecting such land or interest; and (c) a guardian or next friend of any minor claiming to be beneficially entitled under any trust affecting such land or interest (s 323(1) of the NLC).

[15] The question of what is a caveatable interest was considered by the Federal Court in *Score Options*. The following principles may be distilled from the judgment of the apex court:

(a) unlike registrable interests in land (such as ownership of land, leases, charges and easements) or interests that are incapable of registration (such as tenancies exempt from registration), caveatable interests are unregistered interests which are capable of protection by the entry of a private caveat;

(b) the purpose of a caveat is to protect an interest in land, or a right to an interest in that land and to preserve the status quo of the land pending the enforcement of such interest or right;

(c) only a claimant who has a caveatable interest under the NLC may lodge a caveat;

(d) only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land;

(e) to be caveatable, the interest must be an interest in the land which is capable of registration. In other words, it must represent a transaction that can ultimately lead to its registration on the register; and

(f) the registrable interest that the caveator is claiming for under s 323(1)(a) of the NLC must have a present or existing interest as opposed to a potential interest in the land or interest in future.

[16] It is also settled law that a claim for a mere debt cannot amount to a caveatable interest (*Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1976] 1 LNS 135 (PC)).

[17] We will deal with the first step to be adopted by the court on the hearing for removal of a caveat. The learned JC decided that the defendant has a caveatable interest on the basis that without the option the defendant would not have given the loan to the borrower. In other words, the learned JC founded his decision on the fact that the defendant had an option to purchase the land on the basis of the affidavit evidence filed in the proceedings.

[18] As adverted to in paras 4–5 above, the grounds upon which the defendant gave in support of his claim is that pursuant to a friendly loan agreement he gave a loan of RM275,000 to the borrower. There is no mention or reference to an option in the grounds of the application or in the statutory declaration. As such, we are constrained to hold that the learned JC did not confine his examination to the grounds contained in the application for the caveat.

[19] It is trite that if the grounds contained in the application are insufficient in law to support a caveat, then the caveat must be removed without having to go any further. Be that as it may, even if the fact that the defendant had been granted an option is taken into account, there is no evidence to indicate that the defendant had exercised the option to purchase the land immediately after the expiry of the due repayment date or within a reasonable time thereafter (*Chong Siat Yong & Ors v Yee Mun Ying & Anor* [1985] MLJU 3; [1986] 1 CLJ 37). We agree with the submission of learned counsel for the plaintiff that the option had lapsed as the defendant had failed to exercise the option within the

one month period immediately after the borrower failed to repay the loan. In this circumstance, it cannot be said that there was a transaction that can ultimately lead to its registration on the register. As such, on the particular facts of this case the mere existence an option is of itself clearly insufficient in law to support a caveat.

[20] In the light of the findings aforesaid, it is not necessary for the court to consider the question of whether the defendant's claim discloses a serious question for trial and the question of the balance of convenience.

[21] By reason of the foregoing, we are constrained to set aside the decision of the learned JC. The plaintiff's appeal is allowed with costs. The plaintiff's application is allowed in prayers (a), (b), (c) and (d).

Order accordingly.

Reported by Ashok Kumar